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9 AMERISOURCEBERGEN DRUG CORPORATION

10  
11 **UNITED STATES DISTRICT COURT**  
12 **EASTERN DISTRICT OF CALIFORNIA**

13 BARRY DOHNER, individually and as  
14 successor in interest to DEBORA  
15 DOHNER, deceased,

16 Plaintiff,

17 vs.

18 MERCK & COMPANY, INC., a  
19 Corporation; MCKESSON  
20 CORPORATION; a Corporation;  
21 AMERISOURCEBERGEN DRUG  
22 CORPORATION, a Corporation; PFIZER  
23 INC.; PHARMACIA CORPORATION;  
24 G. D. SEARLE LLC, (FKA G.D.  
25 SEARLE & CO.); DOES 1 to 100;  
26 PHARMACEUTICAL DEFENDANT  
27 DOES 101 to 200; DISTRIBUTOR  
28 DEFENDANT DOES 201 to 300,  
inclusive,

Defendants.

Case No. 2:06-CV-02853-DFL-DAD

**AMENDED ANSWER AND  
AFFIRMATIVE DEFENSES OF  
DEFENDANT  
AMERISOURCEBERGEN DRUG  
CORPORATION TO PLAINTIFF'S  
COMPLAINT; DEMAND FOR JURY  
TRIAL**

23 Defendant AMERISOURCEBERGEN DRUG CORPORATION ("Defendant" or  
24 "AMERISOURCEBERGEN") files the following Amended Answer to the unverified  
25 Complaint ("Complaint") filed in the matter of BARRY DOHNER v. MERCK &  
26 COMPANY, INC., et al. (The term "Plaintiff" as used herein shall refer to BARRY  
27 DOHNER, individually and as successor in interest to DEBORA DOHNER, deceased.)  
28 Defendant responds to Plaintiff's Complaint as follows:

## **INTRODUCTION**

AMERISOURCEBERGEN is a wholesale distributor of pharmaceuticals, over-the-counter and health and beauty products to chain, independent pharmacy customers and hospitals. As a wholesale distributor, AMERISOURCEBERGEN distributes products manufactured by others. As to VIOXX®, AMERISOURCEBERGEN does not manufacture, produce, process, test, encapsulate, label, package or repackage these products, nor does it make any representations or warranties as to the products' safety or efficacy. AMERISOURCEBERGEN lacks information or knowledge sufficient to admit or deny the remaining allegations contained in the introduction paragraph of the Complaint and therefore denies such allegations.

## **GENERAL ALLEGATIONS**

1. AMERISOURCEBERGEN is a wholesale distributor of pharmaceuticals, over-the-counter and health and beauty products to chain, independent pharmacy customers and hospitals. As a wholesale distributor, AMERISOURCEBERGEN distributes products manufactured by others. As to VIOXX®, AMERISOURCEBERGEN does not manufacture, produce, process, test, encapsulate, label, package or repackage these products, nor does it make any representations or warranties as to the products' safety or efficacy. AMERISOURCEBERGEN lacks information or knowledge sufficient to admit or deny the remaining allegations contained in Paragraph 1 of the Complaint, and its subparts and subparagraphs, and therefore denies such allegations.

2. AMERISOURCEBERGEN is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations of Paragraph 2 of the Complaint, and therefore denies such allegations.

3. AMERISOURCEBERGEN is a wholesale distributor of pharmaceuticals, over-the-counter and health and beauty products to chain, independent pharmacy customers and hospitals. As a wholesale distributor, AMERISOURCEBERGEN distributes products manufactured by others. As to VIOXX®,

1 AMERISOURCEBERGEN does not manufacture, produce, process, test, encapsulate,  
2 label, package or repackage these products, nor does it make any representations or  
3 warranties as to the products' safety or efficacy. AMERISOURCEBERGEN lacks  
4 information or knowledge sufficient to admit or deny the remaining allegations contained  
5 in Paragraph 3 of the Complaint and therefore denies such allegations.

6 4. AMERISOURCEBERGEN is without knowledge or information sufficient  
7 to form a belief as to the truth or falsity of the allegations of Paragraph 4 of the  
8 Complaint and its subparts and subparagraphs, and therefore denies such allegations.

9 5. AMERISOURCEBERGEN is without knowledge or information sufficient  
10 to form a belief as to the truth or falsity of the allegations of Paragraph 5 of the  
11 Complaint, and therefore denies such allegations.

12 6. AMERISOURCEBERGEN is a wholesale distributor of pharmaceuticals,  
13 over-the-counter and health and beauty products to chain, independent pharmacy  
14 customers and hospitals. As a wholesale distributor, AMERISOURCEBERGEN  
15 distributes products manufactured by others. As to VIOXX®,  
16 AMERISOURCEBERGEN does not manufacture, produce, process, test, encapsulate,  
17 label, package or repackage these products, nor does it make any representations or  
18 warranties as to the products' safety or efficacy. AMERISOURCEBERGEN lacks  
19 information or knowledge sufficient to admit or deny the remaining allegations contained  
20 in Paragraph 6 of the Complaint and its subparts and subparagraphs and therefore denies  
21 such allegations.

22 7. AMERISOURCEBERGEN is a wholesale distributor of pharmaceuticals,  
23 over-the-counter and health and beauty products to chain, independent pharmacy  
24 customers and hospitals. As a wholesale distributor, AMERISOURCEBERGEN  
25 distributes products manufactured by others. As to VIOXX®,  
26 AMERISOURCEBERGEN does not manufacture, produce, process, test, encapsulate,  
27 label, package or repackage these products, nor does it make any representations or  
28 warranties as to the products' safety or efficacy. AMERISOURCEBERGEN lacks

1 information or knowledge sufficient to admit or deny the remaining allegations contained  
2 in Paragraph 7 of the Complaint and its subparts and subparagraphs, and therefore denies  
3 such allegations.

#### 4 **AFFIRMATIVE DEFENSES**

##### 5 **FIRST AFFIRMATIVE DEFENSE**

6 8. The Complaint and all causes of action asserted against Defendant fail to  
7 state facts sufficient to constitute a cause of action.

##### 8 **SECOND AFFIRMATIVE DEFENSE**

9 9. Federal law preempts Plaintiff's claims. Plaintiff has asserted claims for  
10 relief which, if granted, would constitute an impermissible burden by this Court on  
11 Federal laws, regulations, and policies relating to the development and marketing of  
12 products, in violation of the Supremacy Clause, Article VI of the Constitution of the  
13 United States.

##### 14 **THIRD AFFIRMATIVE DEFENSE**

15 10. The causes of action alleged in the Complaint are barred by the applicable  
16 statutes of limitations and/or statutes of repose, including but not limited to California  
17 *Code of Civil Procedure* §§ 335.1 and 338 and former § 340(3), California *Business and*  
18 *Professions Code* § 17208, and *California Civil Code* § 1783.

##### 19 **FOURTH AFFIRMATIVE DEFENSE**

20 11. During the time periods alleged in the Complaint, Plaintiff failed to exercise  
21 ordinary care on Plaintiff's own behalf for Plaintiff's safety. Plaintiff's recklessness,  
22 carelessness and/or negligence caused any injury and damage that Plaintiff may have  
23 sustained. Plaintiff's right to recover should be diminished by Plaintiff's proportional  
24 share of fault.

##### 25 **FIFTH AFFIRMATIVE DEFENSE**

26 12. Plaintiff failed to mitigate any damage that Plaintiff may have sustained.  
27 Plaintiff failed to exercise reasonable care to avoid the consequences of harm, if any.  
28 Among other things, Plaintiff failed to use reasonable diligence in caring for any injury,

1 use reasonable means to prevent aggravation of any injury, and/or take reasonable  
2 precautions to reduce any injury and damage.

3 **SIXTH AFFIRMATIVE DEFENSE**

4 13. During the time periods alleged in the Complaint, Plaintiff had full  
5 knowledge of the risks and possible adverse effects pertaining to the use of the products.  
6 Defendant alleges that part or all of the injuries, damages, or losses, if any, that Plaintiff  
7 claim to have sustained arose from or were caused by such risks. Plaintiff was aware of,  
8 accepted, and assumed the risks and possible adverse effects. Plaintiff's recovery, if any,  
9 should be diminished, reduced, offset, or barred by Plaintiff's assumption of the risks and  
10 informed consent.

11 **SEVENTH AFFIRMATIVE DEFENSE**

12 14. Defendant denies that Plaintiff suffered injuries or incurred any damages, or  
13 that any defendant is liable. If Plaintiff did suffer any injuries or incur any damages, any  
14 injuries or damages were caused, in whole or in part, by the acts or omissions of persons  
15 or entities other than Defendant or superseding or intervening causes over which  
16 Defendant had no control. If there is any negligence or liability by any defendant, it is the  
17 sole and exclusive negligence and liability of others and not this answering Defendant.

18 **EIGHTH AFFIRMATIVE DEFENSE**

19 15. The intervening or superseding cause of any injury allegedly sustained by  
20 the Plaintiff may be conduct which is illicit, criminal, or otherwise improper, and for  
21 which conduct Defendant cannot be held responsible.

22 **NINTH AFFIRMATIVE DEFENSE**

23 16. Plaintiff's alleged damages, injuries, or losses, if any, were not proximately  
24 caused by any alleged act, omission, or breach of duty by Defendant but were caused in  
25 whole or in part by the acts or omissions of Plaintiff and/or others so that the principles of  
26 contributory negligence, comparative fault and/or assumption of the risk apply.

27 **TENTH AFFIRMATIVE DEFENSE**

28 17. Plaintiff's claims are barred in whole or in part because they have been

1 improperly joined in this action.

2 **ELEVENTH AFFIRMATIVE DEFENSE**

3 18. If any of the other parties are negligent, legally responsible, or otherwise at  
4 fault for the damages alleged in the Master Complaint, and if there is a finding of any  
5 liability in favor of Plaintiff or settlement or judgment against Defendant, Defendant  
6 requests that the Court or Jury make an apportionment of fault among all parties as  
7 permitted by *Li v. Yellow Cab Co.* and *American Motorcycle Association v. Superior*  
8 *Court*. Defendant further requests a judgment and declaration of partial indemnification  
9 and contribution against all other parties or persons in accordance with the apportionment  
10 of fault.

11 **TWELFTH AFFIRMATIVE DEFENSE**

12 19. Plaintiff's claims are barred in whole or in part because they have been filed  
13 in an improper venue.

14 **THIRTEENTH AFFIRMATIVE DEFENSE**

15 20. Plaintiff's alleged injuries were the direct and proximate result of an  
16 idiosyncratic reaction which was not reasonably foreseeable, or was not the result of any  
17 conduct or negligence on the part of Defendant; and/or was not the result of any defect in  
18 any product distributed or sold by Defendant.

19 **FOURTEENTH AFFIRMATIVE DEFENSE**

20 21. The hazards of foreseeable uses and misuses of the product are open and  
21 obvious.

22 **FIFTEENTH AFFIRMATIVE DEFENSE**

23 22. After the products left the possession and control of Defendant, if in fact any  
24 products were ever in the possession or control of Defendant, the products were  
25 redesigned, modified, altered, or subjected to treatment that substantially changed their  
26 character without Defendant's knowledge. Any alleged defect resulted, if at all, from the  
27 redesign, modification, alteration, treatment or other change of the products after  
28 Defendant relinquished possession of and control over any of the products.



**SIXTEENTH AFFIRMATIVE DEFENSE**

23. The design, manufacture, and marketing of the products were in conformity with the “state of the art” existing at the time of such design, manufacture, and marketing.

**SEVENTEENTH AFFIRMATIVE DEFENSE**

24. The learned intermediary doctrine bars Plaintiff’s recovery of any damages. Any duty to warn Plaintiff of the risks and hazards associated with the products was discharged by providing adequate warning to physicians.

**EIGHTEENTH AFFIRMATIVE DEFENSE**

25. To the extent that Plaintiff alleges a failure to warn by Defendant, Defendant alleges that the manufacturers, physician, and other health care providers associated with the products knew, or should have been aware, of any risk and hazard that Plaintiff and/or Plaintiff’s decedent alleges rendered the products defective and that allegedly caused Plaintiff’s and/or Plaintiff’s decedent’s injuries and damages, if any. To the extent that such manufacturers, physician, and other health care providers failed to advise, inform, or warn Plaintiff of such risks and hazards, such failure is imputed to Plaintiff under agency principles and Plaintiff and/or Plaintiff’s decedent knowingly and voluntarily assumed the risk of any injury as a result of the consumption of, administration of, or exposure to the product.

**NINETEENTH AFFIRMATIVE DEFENSE**

26. The Complaint is barred due to the lack of privity, or a “transaction,” between Plaintiff and Defendant.

**TWENTIETH AFFIRMATIVE DEFENSE**

27. This Court lacks personal jurisdiction over this answering Defendant.

**TWENTY-FIRST AFFIRMATIVE DEFENSE**

28. Plaintiff’s claims are barred in whole or in part by the doctrines of accord and satisfaction, good faith, consent, res judicata, payment and release, waiver, collateral estoppel, judicial estoppel, equitable estoppel, unclean hands, laches, and/or statutory and regulatory compliance.

**TWENTY-SECOND AFFIRMATIVE DEFENSE**

29. The products were not used in the manner in which they were intended to be used. The products were used in a manner that was abnormal and not reasonably foreseeable by Defendant. Such misuse of the products proximately caused or contributed to Plaintiff's alleged damages, injuries, and losses, if any.

**TWENTY-THIRD AFFIRMATIVE DEFENSE**

30. The imposition of punitive or exemplary damages against Defendant or that are in any way imputed against the interests of Defendant would violate the ruling in *State Farm Mut. Automobile Ins. Co. v. Campbell* (2003) 538 U.S. 408, and Defendant's constitutional rights under: the Due Process clauses in the Fifth and Fourteenth Amendments to the Constitution of the United States; the Sixth Amendment to the Constitution of the United States; the Double Jeopardy clause in the Fifth Amendment to the Constitution of the United States; comparable provisions contained within the California Constitution; the common law and public policies of California; and applicable statutes and court rules, including but not limited to, imposition of punitive damages and determination of such an award:

- (a) by a jury when the jury is: (i) not given standards of sufficient clarity for determining the appropriateness, and the appropriate size, of a punitive damages award; (ii) not adequately and clearly instructed on the limits on punitive damages imposed by the principles of deterrence and punishment; (iii) not expressly prohibited from awarding punitive damages, or determining the amount of such an award, in whole or in part, on the basis of invidiously discriminatory characteristics, including the corporate status, wealth, or state of residence of Defendant; (iv) permitted to award punitive damages under a standard for determining liability for such damages which is vague and arbitrary and does not define with sufficient clarity the conduct or mental state which makes punitive damages permissible; and (v) not



1 subject to trial court and appellate judicial review for reasonableness, the  
2 furtherance of legitimate purpose, and the basis of objective standards;

3 (b) where applicable law is impermissibly vague, imprecise, or inconsistent;

4 (c) subject to no predetermined limit, such as a maximum multiple of  
5 compensatory damages or a maximum amount; and

6 (d) based upon anything other than Defendant's conduct in connection with the  
7 sale of the products alleged in this litigation, or in any other way subjecting  
8 Defendant to impermissible multiple punishment for the same alleged  
9 wrong.

#### 10 **TWENTY-FOURTH AFFIRMATIVE DEFENSE**

11 31. While continuing to deny any and all liability, Defendant states that if the  
12 court determines that Plaintiff is entitled to assert a claim for punitive damages, such  
13 claim cannot be permitted to go forward until the trier of fact determines that punitive  
14 damages should be considered, and, ultimately all issues regarding punitive damages  
15 should be bifurcated at trial. Any award for punitive or exemplary damage absent  
16 bifurcating trial as to issues of compensatory and exemplary damages would be in  
17 violation of Defendant's rights to due process under the United States Constitution and  
18 the correlative provisions of California law.

#### 19 **TWENTY-FIFTH AFFIRMATIVE DEFENSE**

20 32. At all times, any products distributed by Defendant were distributed in  
21 compliance with all applicable federal, state and local laws and regulations, and rules  
22 promulgated and enforced by the Food and Drug Administration. The products were  
23 subject to and received pre-market approval by the Food and Drug Administration under  
24 52 Stat. 1040, 21 U.S.C. § 301. Compliance with such laws, regulations, and rules  
25 demonstrates that due care and reasonable prudence were exercised in the design,  
26 manufacture, and promotion of the subject pharmaceutical product and that said product  
27 was not defective in any way.

28 ///

**TWENTY-SIXTH AFFIRMATIVE DEFENSE**

33. Any damages, injuries and/or losses alleged to have been suffered by Plaintiff has been mitigated, in whole or in part, by reimbursement from collateral sources and therefore, Plaintiff's claims against Defendant are barred and/or reduced by any applicable set off.

**TWENTY-SEVENTH AFFIRMATIVE DEFENSE**

34. At all times, Defendant's acts or omissions were privileged, justified, fair and undertaken in the good faith exercise of a valid business purpose.

**TWENTY-EIGHTH AFFIRMATIVE DEFENSE**

35. Plaintiff cannot demonstrate the necessary elements to support the request for injunctive relief, including without limitation, a threat of imminent or immediate harm.

**TWENTY-NINTH AFFIRMATIVE DEFENSE**

36. Any alleged act or omission by Defendant concerning the manufacture, warning, labeling, advertising and sale of VIOXX® referred to in the Complaint, was at all times, the duty of an entity other than Defendant. Defendant acted in good faith concerning all services for which it had a duty to provide as referred to in the Complaint.

**THIRTIETH AFFIRMATIVE DEFENSE**

37. Plaintiff's claims for disgorgement or restitution are barred under the decision in *Kraus v. Trinity Management Services, Inc.* (2000) 23 Cal.4th 116 and related authority.

**THIRTY-FIRST AFFIRMATIVE DEFENSE**

38. Plaintiff's alleged injuries or illnesses preexisted or were suffered after the alleged use of the products, and Plaintiff's alleged injuries or illnesses were neither caused nor exacerbated by said alleged use.

**THIRTY-SECOND AFFIRMATIVE DEFENSE**

39. Plaintiff's injuries were caused or contributed to by their failure to follow the directions and precautions provided by the product's manufacturer(s).

**THIRTY-THIRD AFFIRMATIVE DEFENSE**

40. Plaintiff's breach of warranty claims are barred because Plaintiff failed to give adequate and timely notice of his alleged claims against Defendant and/or because the alleged warranties were disclaimed.

**THIRTY-FOURTH AFFIRMATIVE DEFENSE**

41. Defendant's alleged business practices with respect to the subject product were lawful, fair, truthful, not misleading or deceptive, not fraudulent, and were justified based on the state of medical and scientific knowledge available during the relevant time and were in compliance with the applicable laws, regulations, and rules within the meaning of either *Business and Professions Code* Section 17200, et seq. or *Business and Professions Code* Section 17500, et seq.

**THIRTY- FIFTH AFFIRMATIVE DEFENSE**

42. Plaintiff's claimed injuries and/or damages are so remote, speculative or contingent that Plaintiff's claims must be barred on public policy grounds.

**THIRTY-SIXTH AFFIRMATIVE DEFENSE**

43. The conduct alleged in the Complaint does not plead a "violation of law" sufficient to provide the necessary predicate for an "unlawful" business practices claim, or any other claim, under either *Business and Professions Code* Section 17200, et seq. or *Business and Professions Code* Section 17500 et seq.

**THIRTY-SEVENTH AFFIRMATIVE DEFENSE**

44. Plaintiff's claims under *Business and Professions Code* Section 17200, et seq. or *Business and Professions Code* Section 17500 et seq. are barred in whole or in part under principles of substantive and procedural due process.

**THIRTY-EIGHTH AFFIRMATIVE DEFENSE**

45. Plaintiff's claims under *Business and Professions Code* Section 17200, et seq. or *Business and Professions Code* Section 17500, et seq. are barred in whole or in part because Plaintiff do not qualify as private attorneys general, and for that reason, among others, lack standing to prosecute a claim for injunctive or monetary relief.

1 **THIRTY-NINTH AFFIRMATIVE DEFENSE**

2 46. Plaintiff's claims under *Business and Professions Code* Section 17200, et  
3 seq. or *Business and Professions Code* Section 17500, et seq. are barred in whole or in  
4 part because there is no basis for injunctive relief in this action and Plaintiff has an  
5 adequate remedy at law.

6 **FORTIETH AFFIRMATIVE DEFENSE**

7 47. Plaintiff's claims under *Business and Professions Code* Section 17200, et  
8 seq. or *Business and Professions Code* Section 17500, et seq. are barred in whole or in  
9 part by the doctrine of primary jurisdiction. The subject of pharmaceutical product and  
10 any advertising regarding such product are regulated by the Food and Drug  
11 Administration and as such, answering Defendant requests that this Court, sitting in  
12 equity, abstain from hearing claims under Sections 17200, et seq. and 17500, et seq.,  
13 which are accordingly preempted by Federal law.

14 **FORTY-FIRST AFFIRMATIVE DEFENSE**

15 48. The Plaintiff is barred from recovery against Defendant because of the  
16 sophisticated user doctrine.

17 **FORTY-SECOND AFFIRMATIVE DEFENSE**

18 49. Plaintiff's strict liability claims are barred under the principles set forth in  
19 *Brown v. Superior Court* (1988) 44 Cal.3d 1088.

20 **FORTY-THIRD AFFIRMATIVE DEFENSE**

21 50. Plaintiff's claim, if any, for loss of consortium is barred because it is  
22 derivative of the injured Plaintiff's/decedent's claim, which fails pursuant to the  
23 affirmative defenses set forth herein.

24 **FORTY-FOURTH AFFIRMATIVE DEFENSE**

25 51. Defendant is a provider of services, not products, and thus is not strictly  
26 liable under California law.

27 **FORTY-FIFTH AFFIRMATIVE DEFENSE**

28 52. Plaintiff's Complaint fails to allege ultimate facts sufficient to state a cause

1 of action predicated upon negligence, strict liability, breach of implied warranty, breach  
2 of express warranty, failure to warn or deceit by concealment.

### 3 **FORTY-SIXTH AFFIRMATIVE DEFENSE**

4 53. Plaintiff's claims of any non-economic damages are subject to *California*  
5 *Civil Code* §1431.2, which is applicable to the Complaint and each cause of action  
6 therein.

### 7 **FORTY-SEVENTH AFFIRMATIVE DEFENSE**

8 54. The product at issue in this litigation is not defective or unreasonably  
9 dangerous because it is a prescription pharmaceutical bearing adequate warnings, and is  
10 subject to the comment j exception to strict liability as set forth in § 402A of the  
11 Restatement (Second) of Torts (1965), and/or because it is a prescription pharmaceutical  
12 that is unavoidably unsafe pursuant to comment k of § 402A of the Restatement (Second)  
13 of Torts (1965).

### 14 **FORTY-EIGHTH AFFIRMATIVE DEFENSE**

15 55. Plaintiff's claims are barred in whole or in part because the subject  
16 pharmaceutical product "provides net benefits for a class of patients" within the meaning  
17 of Comment f to Section 6 of the Restatement (Third) of Torts: Products Liability.

### 18 **FORTY-NINTH AFFIRMATIVE DEFENSE**

19 56. Plaintiff's claims are barred under Section 4, et seq., of the Restatement  
20 (Third) of Torts: Products Liability.

### 21 **FIFTIETH AFFIRMATIVE DEFENSE**

22 57. Plaintiff's claims, if any, related to negligence per se are barred, in whole or  
23 in part, because there is no statute violated by this Defendant.

### 24 **FIFTY-FIRST AFFIRMATIVE DEFENSE**

25 58. Plaintiff's claims are barred in whole or in part by the deference given to the  
26 primary jurisdiction of the Food and Drug Administration over the subject  
27 pharmaceutical product under applicable federal laws, regulations, and rules. These  
28 claims are thus preempted by Federal law.

**FIFTY-SECOND AFFIRMATIVE DEFENSE**

59. Plaintiff's claims are barred in whole or in part because there is no private right of action concerning matters regulated by the Food and Drug Administration under applicable federal laws, regulations, and rules.

**FIFTY-THIRD AFFIRMATIVE DEFENSE**

60. Plaintiff's claims are barred in whole or in part because Plaintiff lack standing to bring such claims.

**FIFTY-FOURTH AFFIRMATIVE DEFENSE**

61. Plaintiff's claims are barred in whole or in part because they fail to meet the requirements of *California Code of Civil Procedure* §§ 377.30, et seq., and 377.60, et seq., governing a decedent's cause of action and wrongful death actions.

**FIFTY-FIFTH AFFIRMATIVE DEFENSE**

62. Plaintiff's claims are barred to the extent they are made by, or on behalf of, out of state Plaintiff or Plaintiff's decedent, or arose from events occurring out of state, are barred in whole or in part under principles of forum non conveniens and due process.

**FIFTY-SIXTH AFFIRMATIVE DEFENSE**

63. Plaintiff's claims are barred in whole or in part because the Complaint fails to join necessary and indispensable parties.

**FIFTY-SEVENTH AFFIRMATIVE DEFENSE**

64. Plaintiff's Consumer Legal Remedies Act cause of action is barred because it fails to meet the requirements of *California Civil Code* §§ 1750, et seq.

**FIFTY-EIGHTH AFFIRMATIVE DEFENSE**

65. Defendant did not design, manufacture, formulate, distribute, market, sell, research, develop, test or supply the VIOXX® that was alleged to have been ingested by Plaintiff and/or any of the ingredients contained therein.

**FIFTY-NINTH AFFIRMATIVE DEFENSE**

66. Plaintiff failed to allege specific facts that Defendant distributed and/or supplied the subject product that Plaintiff allegedly ingested. Accordingly, Plaintiff



1 failed to plead facts sufficient to show an actual connection between Defendant's alleged  
2 conduct and the Plaintiff's purported injury and Defendant has, therefore, been  
3 fraudulently joined.

4 **SIXTIETH AFFIRMATIVE DEFENSE**

5 67. Plaintiff's vague allegations are legal conclusions directed at "defendants" in  
6 general and fail to support any claims specific to Defendant.

7 **SIXTY-FIRST AFFIRMATIVE DEFENSE**

8 68. Plaintiff's claims are barred by the applicable prescriptive periods or statutes  
9 of limitations provided for such claims.

10 **SIXTY-SECOND AFFIRMATIVE DEFENSE**

11 69. Defendant denies that the products distributed by it caused or contributed to  
12 the alleged injuries of Plaintiff and further denies that it is liable to Plaintiff for the claims  
13 alleged or for any other claims whatsoever.

14 **SIXTY-THIRD AFFIRMATIVE DEFENSE**

15 70. Defendant did not make any material representation of fact regarding the  
16 products it distributes which was not true, or if such representation was made, which  
17 Defendant specifically denies, then AMERISOURCEBERGEN did not make such  
18 representation with the intent to either deceive or to induce Plaintiff to act in justifiable  
19 reliance.

20 **SIXTY-FOURTH AFFIRMATIVE DEFENSE**

21 71. Plaintiff did not justifiably rely, in any fashion whatsoever, upon any  
22 statement, representation, advice or conduct of AMERISOURCEBERGEN, and did not  
23 act upon any statement, representation advice or conduct to their detriment.

24 **SIXTY-FIFTH AFFIRMATIVE DEFENSE**

25 72. Defendant asserts that as of the relevant times alleged in the Complaint, it  
26 did not know and, in light of the then existing reasonable available scientific and  
27 technological knowledge, could not have known of: (1) the design characteristics, if any,  
28 that allegedly caused the injuries and damages complained of in the Petition; (2) the

1 alleged danger of any such design characteristics.

2 **SIXTY-SIXTH AFFIRMATIVE DEFENSE**

3 73. Plaintiff's claims are barred, in whole or in part, to the extent Plaintiff, or  
4 any state entity acting on behalf of Plaintiff, has released, settled, entered into an accord  
5 and satisfaction or otherwise compromised Plaintiff's claims.

6 **SIXTY-SEVENTH AFFIRMATIVE DEFENSE**

7 74. Defendant is entitled to set-off, should any damages be awarded against it, in  
8 the amount of damages or settlement amounts recovered by Plaintiff, or any state entity  
9 acting on behalf of Plaintiff, with respect to the same alleged injuries. Defendant is also  
10 entitled to have any damages that may be awarded to Plaintiff reduced by the value of  
11 any benefit or payment to Plaintiff, or any state entity acting on behalf of Plaintiff, from  
12 any collateral source.

13 **SIXTY-EIGHTH AFFIRMATIVE DEFENSE**

14 75. Defendant asserts that it has complied with all applicable state and federal  
15 laws relating to the distribution and/or sale of pharmaceuticals.

16 **SIXTY-NINTH AFFIRMATIVE DEFENSE**

17 76. To the extent Plaintiff assert claims based upon an alleged failure by  
18 Defendant to warn Plaintiff directly of alleged dangers associated with the use of  
19 VIOXX®, such claims are barred under the learned intermediary doctrine.

20 **SEVENTIETH AFFIRMATIVE DEFENSE**

21 77. Defendant reserves the right to rely upon other affirmative defenses as they  
22 become reasonably available and apparent during the discovery proceedings in this case.  
23 Defendant reserves the right to amend this Answer to assert any such defenses.

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26 ///

27 ///

28 ///

**WHEREFORE**, AMERISOURCEBERGEN prays for relief as follows:

1. That Plaintiff take nothing by this action;
2. That judgment be entered in favor of AMERISOURCEBERGEN and against Plaintiff;
3. That AMERISOURCEBERGEN be awarded costs of suit herein; and
4. For such other and further relief as the Court may deem just and proper.

Dated: January 24, 2007

Respectfully Submitted,

**MORRIS POLICH & PURDY LLP**

By: /s/ Kanika D. Corley, Esq.  
Anthony G. Brazil  
Kanika D. Corley  
Attorneys for Defendant  
AMERISOURCEBERGEN DRUG  
CORPORATION

**DEMAND FOR JURY TRIAL**

Defendant hereby demands trial by jury in this matter.

Dated: January 24, 2007

Respectfully Submitted,

**MORRIS POLICH & PURDY LLP**

By: /s/ Kanika D. Corley

Anthony G. Brazil

Kanika D. Corley

Attorneys for Defendant

AMERISOURCEBERGEN DRUG  
CORPORATION

**ELECTRONIC PROOF OF SERVICE**

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen (18) years and am not a party to the within action.

On January 24, 2007, pursuant to the Court's Electronic Filing System, I

☒ submitted an electronic version of the following document via file transfer protocol to ECF (Electronic Case Filing)

☐ submitted a hard copy of the following document to ECF (Electronic Case Filing) by

☐ facsimile

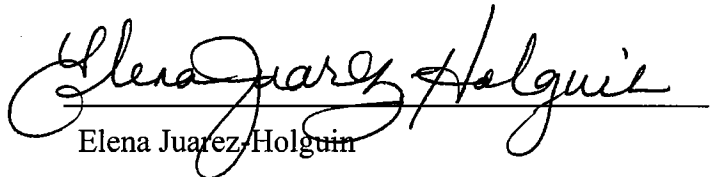
☐ overnight delivery

**"AMENDED ANSWER AND AFFIRMATIVE DEFENSES OF DEFENDANT  
AMERISOURCEBERGEN DRUG CORPORATION TO PLAINTIFF'S COMPLAINT;  
DEMAND FOR JURY TRIAL"**

☐ **STATE** I declare under penalty of perjury under the laws of the state of California, that the above is true and correct.

☒ **FEDERAL** I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made

Executed on January 24, 2007, at Los Angeles, California.

  
Elena Juarez Holguin